Court of Appeals of New York.

JASON WEEKS, APPELLANT, *v.* THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., RESPONDENTS.

The contract of a carrier of passengers implied from the purchase of a ticket, in the ordinary course of business, is to carry the purchaser safely, as to his person and his ordinary baggage, clothing, articles of personal convenience and ornament, and money for personal expenses.

For injuries to his person or loss of his property of the foregoing kind, by the negligence of the carrier, the latter is responsible in damages, although the injury or loss occurred by the violence of third persons, not under the carrier's control. A carrier is bound to exercise the utmost vigilance to protect his passengers from violence as well as from accident.

But where the passenger carries on his person property not included in the class mentioned, and which, from its value, could not be expected to form part of ordinary travelling baggage, the carrier is not liable for its loss even by forcible robbery allowed to take place by the carrier's negligence. If the carrier could be made responsible for such property at all, it would be upon specific delivery into its charge and the payment of a compensation reasonably proportioned to the amount of risk incurred.

A railroad train having stopped in the outskirts of New York about dusk, and there being broken up so that the cars might be separately hauled by horses into the depot, several strangers entered one of the cars being so drawn and forcibly robbed a passenger of $16,000 in bonds, which he had on his person: *Held*, that he could not recover the value of the bonds.

Where, upon such an occurrence, the passenger brought suit, claiming the value of the stolen bonds, and the case was tried upon that issue, the plaintiff should have been nonsuited, although incidentally the violence done to his person was put in evidence. That cause of action not being specifically put forward and appearing only as an incident to the other claim, was not enough to carry the case to the jury.

APPELLANT brought an action in the Supreme Court against the respondent for negligence. The facts as declared upon and shown at the trial were that plaintiff took passage at Bangor, Me., where he lived, for Quincy, Ill., having a through ticket, covering the line of defendants' railroad.

On the arrival of the train at Forty-second street, New York, it was stopped, broken up, and the cars, two-by-two, were drawn to the Twenty-seventh street depot, in Fourth avenue, by horses.

On arriving near the depot, the two cars—in the rear one of which was the plaintiff—were detached, there being room for only one car to enter the depot at a time, and the forward car was drawn by the horses into the depot, leaving the rear one of the two cars standing alone in the avenue, without any horse attached, without

any conductor, brakeman, or other employee of the company upon it, and wholly unprotected.

The plaintiff was in this rear car, and besides him there only remained in it some six or eight passengers, mostly women, one "old-ish gentleman;" most of the passengers having left the car either at Forty-second street, or as it stopped in Fourth avenue, near the depot, probably to go to their homes in the city. This was about dark—the street lamps being lit. The plaintiff, becoming somewhat impatient at the delay, and fearing for his connection with the western train, arose from his seat, about midway of the car, and proceeded towards the front. As he approached it, several men, not passengers, who had entered the car, seized him, knocked his hat down over his eyes, backed him over upon the stove, held him, took from his inner breast coat pocket certain United States 5-20 and other bonds of the value of $16,000, and escaped with them, before any of the passengers or the police arrived to his assistance.

The defendants denied their liability for the loss of the bonds on the ground that no delivery had been made to them and they had undertaken no duty in regard to the bonds. They also relied on the contributory negligence of the plaintiff in carrying property of that kind and of such value in such manner.

The case was left to the jury with instructions that they might find for plaintiff if they believed the loss occurred through the negligence of defendants without any contributory negligence on his own part. The jury found for plaintiff for $16,685.47.

The defendants asked instructions to the jury that under the facts as proved plaintiff was not entitled to recover, which being refused defendants excepted, and on exception the court at General Term set aside the verdict and ordered a new trial. From this order plaintiff appealed to this court.

B. F. Mudgett and *L. R. Marsh*, for appellant, on the point that defendants were liable for negligence in protecting the person and property of plaintiff, cited *Pittsburgh, &c., Railroad Co.* v. *Hinds*, 7 Am. Law Reg. N. S. 14; *Flint* v. *Norwich & N. Y. Trans. Co.*, 6 Blatch. C. C. 158; 34 Conn. 554; *Putnam* v. *Seventh Avenue Railroad Co.*, 55 N. Y. 108; *Pittsburgh, &c., Railroad Co.* v. *Pillow*, 76 Penn. St. 510.

C. G. Child, for respondents.—1. Defendant is not liable except for baggage: *Dexter* v. *S. B. Railroad Co.*, 42 N. Y. 326; *Orange*

County Bank v. *Brown*, 9 Wend. 85; *Magnin* v. *Dinsmore*, 62 N. Y. 35; *Merrill* v. *Grinnell*, 30 Id. 594; *Jordan* v. *Fall River Railroad Co.*, 5 Cush. 69; *Dunlap* v. *Int. Steam Co.*, 98 Mass. 371; *Smith* v. *B. & M. Railroad Co.*, 44 N. H. 325; *C. & C. Railroad Co.* v. *Marcus*, 38 Ill. 219; *Abbott* v. *Bradstreet*, 55 Me. 530; *Hicock* v. *Naug. Railroad Co.*, 31 Conn. 281; *First Nat. Bank* v. *M. & C. Railroad Co.*, 20 Ohio St. 259; *Cahill* v. *N. W. Railway Co.*, 19 C. B. N. S. 818; *Macrow* v. *G. W. Railway Co.*, L. R. 6 Q. B. 612.

2. Defendant is not liable for loss of property retained in the exclusive possession of the passenger: *Fruloff* v. *Cent. Railroad Co.*, 10 Blatch. 16; *Grosvenor* v. *N. Y. Central Railroad Co.*, 39 N. Y. 34; *Cohen* v. *Frost*, 2 Duer 335; *Tower* v. *U. & S. Railroad Co.*, 7 Hill 47; *Doyle* v. *Kiser*, 6 Ind. 242; *Dibble* v. *Brown*, 12 Geo. 217; *Hannibal Railroad Co.* v. *Swift*, 12 Wall. 262; *Talley* v. *Great Western Railway Co.*, Law Rep. 6 C. P. 44.

The opinion of the court was delivered by

FOLGER, J.—The questions in the case arise upon a motion to dismiss the complaint. The grounds of the motion are somewhat generally expressed, but may be considered as making the proposition, that there was no evidence upon which the court should submit to the jury whether the plaintiff should recover for the value of the bonds taken from him. The plaintiff now insists that this was not the only question for the jury, and that it was for them also to inquire whether he did not suffer bodily harm from the assault and battery upon him, and thus sustain damage for which he should have compensation.

This position of the plaintiff cannot be maintained. Plainly, the gist of this action was not for bodily damage, nor was that an incidental part of it, kept in consideration as an element of recovery. The complaint does indeed aver that three men entered the car, and with violence and great force assaulted the plaintiff. There are lacking though all the other averments, which are wont to be made in an action for an assault and battery, either under the common-law forms of pleading or those which conform to the Code.

The demand for judgment is for a sum just equal to the averred value of the bonds taken (though this is not of controlling weight: *Tyng* v. *Comm. Warehouse*, 58 N. Y. 308), with interest thereon, the latter of which is a demand for judgment, which was never yet, we venture to say, annexed to a statement of the amount of damages

from an assault and battery. The course of the trial, as disclosed by the record, shows that the inquiry into the outrage upon the plaintiff was confined to the loss by him of his bonds, and the manner in which they were taken from him, and the facts of the violence to his person were drawn out but as a part of the violence of taking away his property. And when the case is at last submitted to the jury, the charge of the court labors with the matter of the loss of the bonds, with no word of the bodily harm to the defendant, and with no suggestion or request in behalf of the plaintiff that there should be. There is this explicit instruction to the jury: "In case you find for the plaintiff, the amount would be $16,685.47, that being the value of the bonds and interest, as stipulated between the counsel." There was no exception or suggestion drawn from either counsel by this remark, which was not only significant in itself, as showing that the court had heard of no other damage sought, but also as showing that the counsel, in stipulating upon the amount, had confined themselves to the value of the bonds, and had not conferred upon, or thought of, the subject of the bodily harm. True, we are not strictly bound to the pleadings, as once we were, so that they are not always conclusive; but the pleadings, the case made, the findings of a judge or referee, the questions presented to the jury, the exceptions taken, and whatever else appears upon the record which will inform, all these must advise us what was the issue made and tried, and what we are to review as the real matter controverted between the parties: *McKechnie* v. *Ward*, 58 N. Y. 541.

We think that it would be going wide from the track of the trial, if we should now render a judgment based upon the notion that damages for the bodily harm received by the plaintiff was any part of the matter in litigation between the parties. The issue contested was upon a graver and far more important matter. We must treat the action as the court and counsel treated it at the trial, and, for aught that appears upon the record, as it was treated at the General Term, as one to recover of the defendants the value of the bonds lost and never restored. Then the case is this: The plaintiff bought of the defendants the ordinary passage ticket, and paid for it the usual price. By that act the defendants assumed to him the duty of carrying him, and his ordinary baggage, that is, his ordinary clothing, articles of personal convenience, usual ornaments, and money for his personal expenses. He carried in his clothing upon

his person, without the knowledge of the defendants, without any notice to them, as matter of fact, solely in his own care and custody, a package of negotiable securities of much value. These securities were taken from him in the car of the defendants, by the violence of men who had no connection with the defendants, and whose presence upon the car was not known to the defendants, though it might have been. And the jury have found that he was not guilty of negligence contributing to his loss, and that the defendants were guilty of negligence, in not caring for the protection of the plaintiff from violence while on their car, and that because of that negligence the robbery took place.

If the claim of the plaintiff is to be sustained, it must be held, that from the circumstances of the case, the defendants owed such duty to the plaintiff as that they were insurers of the safe carriage of his securities, in the mode of carriage adopted by him; and for no greater consideration than the usual price or compensation paid by any passenger on their vehicles, and without knowledge or notice that he had them upon his person.

The mind conversant with legal topics, and wont to look at the consequences of the laying down of a rule of law, and the lengths to which it may logically be carried, does not readily yield assent to that proposition, and inquires upon what principle the liability of the defendants is sought to be established. It is apparent that if the carrier is liable in such case for a loss by robbery it is liable also for a loss by theft by strangers (see *Abbott* v. *Bradstreet*, 55 Me. 530), or for loss resulting from negligence in any way, no matter what the character of the valuables, or the amount of them borne upon the person, and in the sole care and custody of the passenger. It is then seen that the carrier of passengers, against its will, with no knowledge or notice of the charge and risk put upon it, becomes more, in fact, than a carrier of passengers; it becomes an "express" carrier of packages of value. It becomes such "express" carrier with unusual burdens. It is without knowledge of the value for which it is liable. It is not given the custody of the package. It is liable to be the subject of false and fraudulent claims of individuals, and of false and collusive claims of conspirators, and the victim of wicked plans, sustained by made-up testimony. This, perhaps, partakes of the argument *ab inconvenienti*. But it is a maxim, *argumentum ab inconvenienti, plurimum valet in lege*. Good authority says, that arguments in doubtful cases,

drawn from inconvenience, are of great weight: Per HEATH, J.; *Steel* v. *Houghton et ux.*, 1 H. Bl. 51–61; *Doe ex dem.* v. *Acklam*, 2 B. & C. 779–798; per DALLAS, J., *Deane* v. *Clayton*, 7 Taunt. 489–527; and this argument is worthy of notice in this case against a carrier of passengers only, for it was in use in olden time against a carrier of goods, to found the law of his duty and liability. The carrier of goods is now held liable for the loss of goods stolen from him, though without his negligence. The rigor of the law in this respect arises from reasons of public policy (which is another phrase for public convenience), and to prevent the combinations that might be made with thieves and robbers: *Schieffelin* v. *Harvey*, 6 Johns. 170–177, and cases there cited. It would seem that it should have another side too, and be applied in favor of a carrier of passengers, to protect him from risks which he has not knowingly assumed. And otherwise, as is well said at General Term, "the rule limiting the liability of the carrier to a reasonable amount of money to meet the expenses and conveniences of the traveller, would be so completely evaded as to be practically nullified." The inquiry for a principle, for the proposition of the plaintiff to rest upon, is made with more doubt of a convincing answer, for the reason, that there is a principle, at the foot of the obligation or duty of a common carrier, which seems adverse to the existence of a right of action in the plaintiff. A common carrier is bound, in that his occupation is in its nature a public one, to carry all that is offered to him for carriage, in the line of his particular branch of service. For this he has a right to demand a reasonable compensation. The amount of that compensation must in reason vary, as the amount of risk which he takes is varied. And he who employs the carrier is bound not to conceal from him the facts in his case, which materially increase that risk: *Pardee* v. *Drew*, 25 Wend. 459. And if he does conceal, it is a fraud upon the carrier, if it is to subject him to a liability so much greater than he contracts for, or than he is bound to suppose is assumed by him: *Sewall* v. *Allen*, 6 Wend. 335, per Chancellor, p. 349; *Nat. Bank* v. *M. & C. Railroad Co.*, 20 Ohio St. 259. Now it is apparent that the defendant would not have engaged with the plaintiff to carry safely those securities, left upon his person, and solely in his custody, at no more than the usual rate of compensation for the carriage of a passenger and his ordinary baggage and travelling paraphernalia. And inasmuch as they would not, and could not have been compelled to,

have so engaged, without an increase of remuneration, it follows that taking him with the valuable securities with which he was indued, they, in ignorance and unnotified thereof, owed him no duty, as a general rule of their occupation, to give to him and his property more than the usual care, demandable from them by any passenger. In such case, in legal contemplation, the thing of value is not in the charge of the carrier as such, and he has made no contract, and entered into no duty, in regard to it. This is upon the assumption, for the purpose of the case, that though as to the plaintiff they were carriers of passengers only, they might be compelled to take the charge for the journey of articles not a part of a passenger's ordinary baggage and equipment, and yet of high value. It is at least doubtful whether, had the plaintiff given the defendants notice of his intention of carrying with him these securities of value, they could have been compelled to have undertaken the safe carriage and sure delivery of them, or that it was any part of their duty so to do: *Sewall* v. *Allen*, *supra*.

The plaintiff seeks to base the right to recover of the defendants upon the ground that they were bound to protect the passengers in their cars from open invasion and forcible assault, injury and robbery. We do not need to deny this proposition here; we need not shrink nor stretch the rule laid down in *Putnam* v. *Broadway and Seventh Ave. Railroad Co.*, 55 N. Y. 108. A carrier of passengers is bound to exercise the utmost vigilance in maintaining order and guarding his passengers against violence: Id. But if he neglects to do so, for what is he liable? His liability arises upon contract expressly made or implied from his duty or from the duty of his employment, public in its nature. It is plain that the plaintiff and defendants here made no express contract in relation to these securities. Whatever contract the sale and purchase of a passenger ticket expresses, it does not make a contract which was not in the minds of both the parties or imputable to them by law. We have shown that the law does not impute a contract to carry, for a passenger, other goods than ordinary baggage. And as the defendants had no knowledge or notice of these securities, they could not have had intention to engage for the carriage and delivery of them. If the plaintiff is to recover, it must be *ex delicto*, upon the duty of defendants. A public carrier of goods is bound to vigilance, and may set up as an excuse for want of safe carriage and safe delivery nothing but an exempting act of the shipper, an act of God

or of the public enemy. Yet if the shipper conceal from the carrier or fail to notify him that in a package of mean appearance is placed an article of great value, the ordinary negligence of the carrier may sustain a judgment for what a passenger usually carries, but will not warrant a recovery by the shipper of the worth of his property of great price: *Miles* v. *Cattell*, 6 Bing. 743. The carrier of goods, in the absence of express agreement, is liable by reason of his negligence for damages to such amount as would ordinarily be expected to result therefrom. So, though a carrier of passengers is bound to guard one going in his vehicle from violence, the damages he must pay if he neglects his duty are such as would ordinarily result therefrom, as would naturally be contemplated by the parties on making their contract, or assuming their relative rights and obligations. Such a carrier is bound to take the passenger and to carry together with him his luggage, reasonable in size and weight, and in kind and value of the articles filling it, such as is naturally and usually required by a passenger and reasonable for his personal use while on the way or at his place of destination. Should that luggage be lost by the carrier, or misdelivered or stolen from him, though it may contain large sums of money or articles of great value or things not destined for personal use, the carrier is liable, not however for them, but for so much of the contents as falls within the classification we have given above. In the same way (it may be, though we do not pass authoritatively upon it), should a passenger be assailed in the vehicle of the carrier, in such circumstances as that it was a breach of the duty of the latter that he failed to protect the former from violence, and should he be robbed of portions of his clothing or usual and reasonable articles of personal ornaments, his watch or his purse with the money for his travelling and other personal expenses, it may be that the carrier would be liable for the loss which his passenger had sustained. But, if the passenger had seen fit privately to place and carry upon his person securities or articles of great value, not falling within the above category, without the knowledge of, or notice to, the carrier, and in the melee they should be lost or taken, the latter is not liable for them. He has entered into no especial contract to carry and deliver them. He owes no duty in regard to them by reason of his public calling, that is not fulfilled, so long as he is free from gross negligence and fraud. The absence of notice to him of the purpose to carry them has prevented him from exacting a reason-

able compensation for the carriage, and what is more, from making provision for safety, in measure with the increase of the hazard incurred. For the carriage of himself, his watch, his purse, &c., &c., the passenger does perhaps make contract with the carrier, or so does set in operation the duty of the latter, when he buys his ticket or takes his passage, and does, it may be, legally demand of him a care and diligence up to the needs of the hazard, and renders him liable for such damage as is in the contemplation of the contract or the scope of the duty. We have of late, at some length, considered some questions having an intimate relation with this, and refer to that case for some authorities: *Magnin* v. *Dinsmore*, 62 N. Y. 35.

The learned counsel for the appellant concedes and contends, that the property stolen in this case is not to be considered as baggage, or to be governed by the rules which have been laid down as to the loss of that, and liability therefor. He puts the right to recover upon the duty of the carrier to protect the person of the passenger from violence. Is it logical to say that the defendants are not liable for the loss of these securities as baggage, or as goods, wares, merchandise; that is, that the presence of them in the car, in the character of a valuable thing, did not create a duty as to them; but that by the fact of their being on the person of the plaintiff in the car, there arose from the duty to care for his person a duty to care for them? They were nothing else on his person than off of it. They did not become a part of his person, and thus evoke a duty to care for them as a part thereof. They were still property, extraordinarily in the vehicle of the defendants. Nor do we see how the fact that the loss occurred through violence to the person of the plaintiff from other men, rather than from accident, makes a difference in the case. The defendants were bound to protect the plaintiff from the violence of a railway accident, as well as from the intentional violence of ruffians and rogues. Would it be claimed that if, in the occurrence of a railway accident, these securities had become lost from the person of the plaintiff, in any of the many ways that may be imagined, with no other human intervention than was concerned in the accident itself, that the defendants would have been liable for the loss? Such a case has been adjudicated in the negative, after ingenious argument and well-considered opinion: 20 Ohio St., *supra*. To hold otherwise would be to extend the liability of the carrier to a new matter by reason

of the human violence and the injury therefrom, making the character alone of the act create a new duty. The carrier of passengers is liable for harm to their persons from the violence of intruders, when he has been negligent in his duty to protect from it. He is liable for harm to their property when he has been negligent in his care of it, if confided to his care, either in fact or in law. His negligence is thus the ground of liability in both cases. But the proposition contended for would make the negligence by which violence comes to the person and property of the passenger from other human beings, far more extensive in its consequences than the negligence by which violence comes to the person and property or to the property alone, from inanimate things. We see no reason for this. We have confined our consideration to the ground taken by counsel, with such illustrations and arguments drawn from kindred topics as seemed profitably to bear upon the subject. We have not thought it well to rely upon a rule laid down in *Tower* v. *N. & S. Railroad Co.*, 7 Hill 47, although there the article lost was a part of a passenger's clothing, and was taken by him into the car of the defendant, and kept in his own custody, for the reason that there was in that case no element of violence to the passenger and loss of property thereby; and because the case is also put upon the negligence of the passenger in the care of his property, which we cannot assume in this case. There are some cases cited by counsel in which the learned judges in their opinions have used phrases to the effect that the carrier is liable for *all the injury* or for *any injury* sustained: *Flint* v. *Norwich Tr. Co.*, 6 Blatch. 158; 55 N. Y. 108, *supra*. In those cases the cause of action was solely for injury to the person; and the remarks were appropriate. They are not to be applied to a case of this kind. Like "every other proposition laid down by a judge 'they' ought to be understood with particular reference to the facts of the case then before the court." Per Lord ELLENBOROUGH, C. J., *Hunter* v. *Princess*, 10 East 392. It is intimated on the points of the learned counsel for the appellants that the jury might have found that the plaintiff carried a bond with which to raise the money for his journey. If it is meant that such a consideration as this would require the submission of the case to the jury, it suffices to say, that there is no such hint in the testimony upon the trial; and it would not have been right for the court to have submitted such a question to the jury.

From our consideration of the case, it is our judgment that the

valuable securities carried by the plaintiff were not a part of the property, which he could in his ordinary relation of passenger of the defendants bear about his person at their risk, and under their duty as carriers to protect him and his necessary, convenient and ornamental reasonable personal chattels and money; that for that reason the value of them does not properly enter into an estimate of the damages with which they should be charged, on a recovery by him against them, for not protecting him from violence while he was rightfully in their car, they being assumed to be guilty of negligence therein, and he being taken as free from contributory negligence. It was error then, under the circumstances of this case, to submit any question to the jury. The complaint should have been dismissed. We think that the question we have determined was fairly presented by the motion to dismiss the complaint on the ground that this "injury and grievance is too remote to charge the defendants with damage," and that, "under all the circumstances of the case, the plaintiff has no legal ground for a recovery" against them.

The order for a new trial must be affirmed, and judgment absolute given for the defendant on the stipulation.

United States Circuit Court, Eastern District of Virginia.

W. T. BLACKWELL ET AL. *v.* W. E. DIBRELL ET AL.

A trade-mark, consisting of a word and symbol, arbitrarily assumed, may be lost by non-use, especially if the disuse continue as long as eight years.

If an equivalent trade-mark is, without any knowledge of the first one, originated and devised by another person during the period of such disuse, for use at a particular place, or for a commodity of a particular region, that other person may thereby acquire a right of exclusive use in the second trade-mark, at such place, on such product, and may enjoin the general use of the first trade-mark.

If the second trade-mark, during such period of disuse, acquires a peculiar geographical and commercial signification, so that the use of the original one, as an arbitrary device, would operate to deceive and defraud the public, a court of equity may enjoin against the use of the first trade-mark.

In order to constitute one suit an estoppel in another, four conditions must exist, viz.: there must be an identity of the cause of action, of the parties, of the character in which the parties sue, and of the thing in controversy.

BILL in equity for an injunction and account. The facts as they appeared in the pleadings and the evidence were that some time before the year 1860, the North Carolina railroad was laid off over the farm of Dr. Bartlet Durham, in Alamance county, North Carolina. A station was established there and called *Durham's Station*. This